IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 4TH DECEMBER 2006 / 13TH AGRAHAYANA 1928

CRL.A.No. 2220 of 2005(C)

SC.760/2001 of ADDL.DISTRICT & SESSIONS COURT (FAST TRACK -I) THIRUVANANTHAPURAM

CP.153/2000 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II, ATTINGAL

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APPELLANT/ACCUSED:

SUNDARAN, S/O.KUNJAN,
C.NO.9845, CENTRAL PRISON,
TRIVANDRUM-695 012.

BY ADV. SRI.S.MOHAMMED AL RAFI,(STATE BRIEF)

RESPONDENT/COMPLAINANT:

THE STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 2220 OF 2005

Dated this the 4th day of December, 2006

JUDGMENT

The appellant is the accused in Sessions Case No.760 of 2001 on the file of the Additional District and Sessions Court (Fast Track -I) Thiruvananthapuram. The appellant faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case was that while PW.2, the Preventive Officer along with the excise party was on patrol duty at about 7 A.M. on 5.7.1998, they found the appellant transporting 5 litres of arrack in a black plastic can having a capacity of 5 litres on the southern side of the road leading to Murukkumpuzha kadavu in front of Vailoor Village office. To prove the case against the appellant, the prosecution examined PWs.1 to 5 and produced Ext.P1 to P5 and also MO.1 empty black plastic can. On closing the prosecution evidence, the appellant was questioned under Section 313 Cr.P.C. and he denied the allegation levelled against him. The trial court relying on the oral and documentary evidence adduced by the prosecution found the appellant guilty under Section 55(a) of the

Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period one year more. The above conviction and sentence are challenged in this appeal.

3. The appeal is filed through the jail authorities and the appellant is defended by a State Brief. Learned counsel appearing for the appellant submits that the trial court went wrong in placing reliance on the prosecution evidence to find the appellant guilty of the charges as the evidence of the official witnesses is not corroborated by the evidence of any independent witnesses. Further, counsel submits that as per the decision of this Court reported in **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D.(Cri.) 631**, the conviction entered against the appellant under Section 55(a) of the Abkari Act is not legally sustainable.

4. According to PW.2, the Preventive Officer, he and the excise party found the appellant transporting 5 litres of arrack in a black plastic can. After questioning the appellant, he arrested him and seized the contraband articles as per Ext.P1 mahazar in the presence of PW.1, an independent witness. PW.2 deposed before the court below that he

produced the appellant along with the contraband articles before PW.4, the Excise Inspector, Kazhakuttom who registered a case against the appellant. On the basis of the forwarding note submitted by PW.4, sample was taken from the can and forwarded for chemical analysis. Ext.P3 is the chemical analysis report which shows that the sample contained 14.62% by volume of ethyl alcohol. The evidence of PW.2 is corroborated by the evidence of PW.5 who had accompanied PW.2. Out of the five witnesses examined, PWs.2 to 5 are official witnesses. PW.1, the only independent witness turned hostile to the prosecution, but he admitted his signature in Ext.P1 seizure mahazar. PW.3 , the successor of PW.4 conducted investigation and laid the charge sheet against the appellant under Sections 8(1) read with Section 8(2) and Section 58 of the Abkari Act. Relying on the evidence of PWs.2 to 5, the trial court found that the appellant committed offence punishable under Section 55(a) of the Abkari Act.

5. Learned counsel for the appellant submits that on the basis of the charge framed by the trial court, the finding entered by the trial court that the appellant committed offence under Section 55(a) of the Abkari Act requires reconsideration. The charge reads as follows:

> "That you on 05.07.1998 at 7 a.m. were found possessing 5 litres of arrack in a black plastic can having a capacity of 5 litres on the southern side of the road leading to Murukkumpuzha kadavu from Murukkumpuzha junction in front of Vailoor village office, Vailoor village and thereby committed an offence punishable u/s. 55(a) of Abkari Act."

A reading of the above charge would show that the court below proceeded on the assumption that the petitioner committed the offence by possessing the 5 litres of arrack. The prosecution has a case that the appellant was found transporting 5 litres of arrack. The dictum laid down by this Court in the decision reported in **Sudhepan @ Aniyan v. State of Kerala, 2005 (2) K.L.D.(Cri.) 631** is that if a person is found in possession of liquor or arrack not in connection with export, import, transport or transit, he cannot be found guilty under Section 55(a) of the Abkari Act. In the case on hand, the evidence of PWs.2 and 5 would clearly indicate that the appellant was found transporting 5 litres of arrack. In the above circumstances, the dictum laid down in the decision referred to above is not applicable in this case. Hence, the contention of the learned in this regard is not sustainable.

6. On an overall appreciation of the evidence of the prosecution witnesses, this Court is of the view that the trial court correctly found the

appellant guilty under Section 55(a) of the Abkari Act. Hence, the conviction entered against the appellant is legally sustainable.

7. The next question to be considered is with regard to the sentence awarded by the trial court. The trial court found that possession of arrack was a social offence which would affect the very economy of the State. The trial court also considered the quantity of arrack which the appellant was transporting. Considering all these aspects, this Court is of the view that the substantive sentence ordered against the appellant does not require any interference. At the same time, this Court is of the view that the sentence awarded by the court below for default of payment of fine can be reduced. Hence, the default sentence of rigorous imprisonment for a period of one year shall stand reduced to simple imprisonment for a period of six months.

With the above modification in the sentence awarded for non-payment of fine, the Crl. Appeal is dismissed.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A. NO.2220/2005

JUDGMENT

4TH DECEMBER, 2006